Supreme Court, U.S.
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(2)

CASE NO. 86-447

in the Supreme Court of the United States

October Term, 1986

DAWN DEVELOPERS, INC., et al.,

Petitioners,

vs.

REAL ESTATE CORPORATION OF FLORIDA, N.V.,

Respondent.

On Writ of Certiorari to the Florida Fifth District Court of Appeal

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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16 pp

PARTIES IN PROCEEDING BELOW

Plaintiff/Counter-Defendant in the trial court, Appellee in the Florida Fifth District Court of Appeal, and Respondent in this Court:

Real Estate Corporation of Florida, N.V., a Netherlands Antilles corporation.

Counter-Defendants in the trial court, Appellees in the Fifth District Court of Appeal:

Community Developers of Osceola County, Inc., a Florida corporation;

Landstar Management Associates, Inc., a Florida corporation;

Greenway Advertising, Inc., a Florida corporation;

Mid-Florida Community Sales Corporation, a Florida corporation;

Orange-Osceola Management Corporation, a Florida corporation;

Community Developers of Orange County, Inc., a Florida corporation;

Landstar Management Corporation, a Florida corporation.[1]

Defendant/Counter-Plaintiff in trial court, Appellant in Florida Fifth District Court of Appeal, and Petitioner in this proceeding:

Dawn Developers, Inc., a Florida corporation.

Defendants in the trial court, Appellants in the Florida Fifth District Court of Appeal, and Petitioners in this proceeding:

Murray M. Golub;
Thomas L. Dyer.

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[1]These Counter-Defendants, who have no interest in this proceeding (which does not involve the counterclaim), are all affiliates of Respondent, Real Estate Corporation of Florida, N.V. Additional affiliates of Respondent are as follows: Wholly owned subsidiaries—Orange Osceola Utilities, Inc., Buenaventura Lakes Country Club, Inc.; Affiliates—Active—Centaur Construction Company, Country Creek Joint Venture, Landstar Management Corporation, Mid-Florida Community Sales Corporation, Urban Community Developers, Inc., Ranch Investments, Inc., Meadow Woods Shopping Center, Meadow Woods Country Club, Inc., Landstar Management Associates, MW Investment Group, Buenaventura Lakes Shopping Center; Affiliates—Inactive—Orange Osceola Management Corporation, E. S. Investment Group.

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CITATIONS TO JUDGMENTS BELOW

The judgment of the trial court, which is unreported, is set forth in Petitioners' appendix. The decision of the Florida Fifth District Court of Appeal, affirming the trial court's judgment without opinion, is reported: *Dawn Developers, Inc. v. Community Developers of Orange County, Inc.*, 489 So.2d 32 (Fla. 5th DCA 1986).

STATEMENT REGARDING JURISDICTION

The Petition for a Writ of Certiorari was initially received by the Clerk of this Court on August 25, 1986, but returned to Petitioners' counsel pursuant to Supreme Court Rule 33.7. Assuming that the new submission is in proper form, the Petition, which relies for jurisdiction on 28 U.S.C. §1257(3) (1982), is timely. Petitioners omit from their statement of jurisdiction, however, the concession at page 17 of their Petition that the federal issues "were not raised in the pleadings, at trial, or on appeal."

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners include in their appendix copies of the Florida statutory provisions involved and of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961 *et seq.* (1982). Petitioners omit, however, the constitutional provisions they purport to rely on, which are (in pertinent part) as follows:

U.S. Const. amend. V:

No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. art. 1, §10, cl. 1:

No State shall . . . pass any . . . law impairing the obligation of contracts . . . .

U.S. Const. art. 6, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

Petitioners concede (at page 17):

These constitutional issues were not raised in the pleadings, at trial, or on appeal.

Real Estate Corporation of Florida, N.V. ("REC") sued Dawn Developers, Inc. and its principals, Murray M. Golub and Thomas L. Dyer, under Florida common

law and Florida's Racketeering Influenced and Corrupt Organizations Act, Florida Statutes §§895.01 *et seq.* (1983).[2]

REC and Dawn Developers, Inc. built homes in Florida. Agreements between them provided for a division of sales proceeds net of land and sales costs and actual construction costs. Messrs. Golub and Dyer extracted secret, additional profits from the development through a sham subcontractor. The jury returned a verdict in REC's favor, and the trial court trebled REC's damages pursuant to Florida Statutes §895.05(7) (1983). Trebling was also appropriate under Florida's "civil theft statute." Florida Statutes §812.035 (1983).

The Florida Fifth District Court of Appeal affirmed without opinion.

SUMMARY OF ARGUMENT

Petitioners raise federal issues concerning the constitutionality of Florida statutes. Petitioners did not raise these issues in Florida courts. This Court should therefore deny review.

The Florida RICO statute does not violate due process by allowing civil remedies based on a preponderance of the evidence. That standard applies even under the federal RICO statute; this Court has expressed doubt that such a standard poses any serious constitutional problem.

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[2]This Florida statute is substantially similar to the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961 *et seq.* (1982).

Nor is there here a violation of the Contract Clause. No impairment of contract exists; the parties' contractual relation post-dated Florida's enactment of civil remedies for racketeering.

Neither argument nor authority supports Petitioners' mere suggestion that the federal RICO Act preempts similar state legislation. This contention is frivolous, as are all others in Petitioners' brief.

ARGUMENT

I.

PETITIONERS' ADMITTED FAILURE TO RAISE ANY FEDERAL ISSUE BELOW PRECLUDES THIS COURT'S REVIEW

Petitioners concede (at page 17):

> These constitutional issues were not raised in the pleadings, at trial, or on appeal.

This Court should therefore not consider the petition. *See Heath v. Alabama*, 106 S.Ct. 433, 436 (1985):

> Even if we were not jurisdictionally barred from considering claims not pressed or passed upon in the state court, as has sometimes been stated, *see, e.g., State Farm Mutual Automobile Insurance Company v. Duel*, 324 U.S. 154 (1945); *Crowell v. Randell*, 10 Pet. 368 (1836), the longstanding rule that this court will not

consider such claims creates, at the least, a weighty presumption against review. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 218-222 (1983).

II.

THE FEDERAL ISSUES RAISED HERE FOR THE FIRST TIME ARE FRIVOLOUS

a. The Florida RICO Statute Does Not Violate Due Process By Permitting Civil Remedies Based On A Preponderance Of The Evidence

The trial court instructed the jury that REC had to establish its racketeering claim by the "greater weight of the evidence."[3]

Petitioners claim that Florida's racketeering statute somehow deprived Petitioners of property without due process "by not requiring a criminal charge nor criminal standard of proof prior to imposition of civil penalties." Petitioners do not explain this argument or cite any authority.

This Court in *Sedima, S.P.R.L. v. Imrex Co.*, 105 S.Ct. 3275 (1985), reversed the United States Second Court of Appeals' imposition of a conviction requirement in a civil action under the federal RICO statute, and expressed doubt that the "preponderance of the

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[3]*See Senfeld v. Bank of Nova Scotia Trust Company*, 450 So.2d 1157, 1163 and n. 8 (Fla. 3d DCA 1984); *Banderas v. Banco Central del Ecuador*, 461 So.2d 265 (Fla. 3d DCA 1985). Effective October 1, 1986, Florida requires "clear and convincing evidence" in civil racketeering actions. 1986 Laws Fla. ch. 86-277, enacting Florida Statutes §772.04 (1986 Supp.).

evidence" standard presented any serious constitutional question:

> We are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under §1964(c). In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard. There is no indication that Congress sought to depart from this general principle here. That the offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards or that the consequences of a finding of liability in a private civil action are identical to the consequences of a criminal conviction. But we need not decide the standard of proof issue today. . . .
>
> The court below also feared that any other construction would raise severe constitutional questions, as it 'would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation 'racketeer', authorize the award of damages which are clearly punitive, including attorneys' fees, and constitute a civil remedy aimed in part to avoid the constitutional protections of the criminal law.' *We do not view the statute as being so close to the constitutional edge.*

105 S.Ct. at 3282-83 (citations omitted, emphasis added).

b. The Florida RICO Statute Does Not Violate The Contract Clause

Petitioners posit as their second question for review:

> Whether Florida's RICO and Civil Theft Statutes are an unconstitutional infringement on the right to contract where petitioners' duties were contractual and on breach thereof petitioners were found liable for civil theft and RICO violations.

Petitioners do not explicate this argument and cite no authority. Whether Petitioners seek to invoke the contract clause, U.S. Const. art. 1, §10, cl. 1, or substantive due process under U.S. Const. amend. V, the argument is frivolous.

The first contract between these parties was entered in 1978. The Florida legislature provided civil remedies for racketeering in 1977.[4] There has therefore been no impairment of any contractual obligation. *See generally National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451 (1985). And, the due process clause does not prevent a state "from prohibiting contracts to engage in conduct banned by a valid state law." *Lincoln Federal Labor Union No. 19129, AFL, v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 533-34 (1949); *New Motor Vehicle Board of California v. Fox*, 439 U.S. 96, 107 (1978).

[4]1977 Laws Fla. ch. 77-334 §5, then codified at Fla. Stat. §943.464 (1979), renumbered as Florida Statutes §895.05 by 1981 Laws Fla. ch. 81-141 §2.

c. The Federal RICO Statute Does Not Preempt The Florida RICO Statute

Petitioners posit as their third question for review:

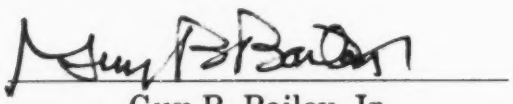
> Whether the Federal Racketeering Influenced and Corrupt Organization Act has preempted state legislation in the area.

Petitioners do not even mention this question in their argument, and, again, cite no authority. Nothing in or about the Racketeering Influenced and Corrupt Organization Act even suggests preemption. *See generally Wardair Canada, Inc. v. Florida Department of Revenue*, 106 S.Ct. 2369 (1986).

CONCLUSION

As Petitioners concede, no federal question was raised below. The supposed federal claims stated in the Petition are frivolous. The Petition should therefore be denied, and this Court should impose appropriate sanctions on Petitioners and their counsel.

Respectfully submitted,



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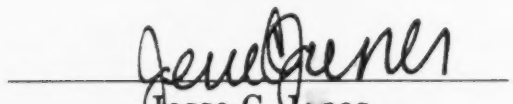

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